Riparian/Littoral Rights and the Administration of Aquatic Crown Land

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PREFACE

The ownership of property located adjacent to a watercourse or water body has traditionally provided the property owner with certain riparian/littoral rights. Such rights include access to and from the water, protection of property from erosion, ownership of naturally accreted material, and use of water of undiminished flow and quality for domestic purposes.

Certain of these common law riparian/littoral rights are still recognized in British Columbia, and influence the land administration function of the Ministry of Lands, Parks and Housing. Similarly, land administration activities undertaken by the Ministry can affect the riparian/littoral rights of owners of property located adjacent to aquatic Crown lands.

This report provides a review of various aspects of riparian/littoral rights as recognized in British Columbia, and as reflected in the land administration policies of the Ministry. It is intended to provide a basis for enhancing their recognition by the Ministry.

Although its content is based on findings of legal cases involving riparian/littoral rights, the conclusions and administrative guidelines contained in this report do not represent legal opinions about the nature or extent of such rights.

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RIPARIAN/LITTORAL RIGHTS

AND THE ADMINISTRATION OF

AQUATIC CROWN LAND

1.0 INTRODUCTION AND PURPOSE

The Ministry of Lands, Parks and Housing is responsible for the administration of aquatic Crown lands in British Columbia. The ownership of property located adjacent to aquatic Crown land and the riparian/littoral rights conveyed by that ownership can impact significantly on the Ministry's administrative function. Similarly that administrative function can have important repercussions with respect to such rights.

This report reviews the nature and extent of riparian/littoral rights. It documents those rights which are recognized in the Province of British Columbia and demonstrates the ways in which such rights affect and are in turn affected by the administration of Crown land. Guidelines are provided detailing the conditions under which the Ministry must recognize riparian/littoral rights in carrying out its administrative function.

2.0 RIPARIAN/LITTORAL RIGHTS: HISTORICAL AND LEGAL FOUNDATIONS

2.1 The Origin of Riparian/Littoral Rights

For centuries it has been recognized that water bodies and watercourses have an important value for marine commerce. Even non-navigable streams have long been the focus of special attention because of their value in supplying potable water and irrigation. As a result, certain rights have become established over time relative to their use. Access to and from waterfront property, maintenance of quality and quantity of surface water flow, and the ownership of naturally accreted material, long ago became rights under English common law. These various rights have been refined through years of legal proceedings and findings.

In some cases these rights have been abrogated through passage of legislation which specifically deals with riparian/littoral issues. In other cases they have become entrenched or formally recognized under the original common law. The process of refinement continues, with the resolution of each successive legal case providing additional clarification of their nature and extent.

2.2 The Nature and Extent of Riparian/Littoral Rights in British Columbia

The word "riparian" derives from the Latin "ripa" meaning the bank or shoreland adjacent to a body of water - specifically a river or stream. The term "littoral" refers to land bordering on a lake or the sea.

Riparian/littoral rights involve in all cases a relationship between water and the land beside which or over which it rests or flows. As defined in English common law, riparian/littoral rights generally include the following:

- protection of land;
- quality and quantity of water flow;
- natural accretion; and
- access (i.e. ingress and egress).

The whole question of extension of property rights out into a river or other body of water is also often included in the discussion of riparian/littoral rights, although this is more a question of ownership of the bed of such waterbodies than a question of rights per se. Similarly, the matter of constructing facilities on the foreshore to provide for or enhance access (ingress/egress) is often tied in with the issue of riparian/littoral rights, even though in Canada such construction is not a right of the upland owner.

As such, the latter two subject areas will be clarified as part of the analysis of riparian/littoral rights in the following sections.

2.2.1 Protection of Land

It is recognized in British Columbia that a shoreland property owner has a right to protect that land from erosion and flooding, through the placement of embankments, dykes or other protective improvements. This right extends only to the surveyed boundary of the property. The shoreland owner therefore has the right to install protective structures on his own land; but where he wishes to extend such structures onto the foreshore, permission of the Crown is required.

2.2.2 Quality and Quantity of Water Flow

The original and fundamental riparian right was a right to use water in a stream or river for domestic purposes. From a time when many water users would

utilize water from a common stream traversing their lands for domestic supply and irrigation, the equal right of those users to water of undiminished flow and quality has been considered a basic riparian right.

In British Columbia, this right was abrogated by the Land Act of 1884 (Redel, 1975, p.4). In this Act, the amount of water utilized or appropriated from a stream or river by a given riparian owner was to be controlled and recorded. This was the beginning of the water licencing system. Although it provides users with certain downstream rights of water quality and quantity, the provisions of the Act limit such users in the amount of water they may rightfully claim for their own use.

2.2.3 Natural Accretion

Land abutting any body of water is subject to certain forces of erosion and deposition (accretion). The ownership of naturally accreted land has long been the subject of legal debate.

The position generally adhered to in British Columbia is that the owner of adjacent property does not obtain a right to claim ownership of land created by sudden accretion, rapid accretion resulting from artificial interference in natural processes, or addition to shoreland through the uplifting of a lake or stream bed. The adjacent property owner is considered to have a claim to accreted material only where the material has been deposited through gradual deposition of material onto the bank or shoreland by natural processes, or, in some cases where the material has imperceptibly built up as a result of a man-made structure which is located on another property. This riparian/littoral right to gradually accreted material has been upheld in British Columbia in several legal cases in past decades, and is determined in accordance with the provisions of the Land Title Act and the Land Title Inquiry Act.

2.2.4 Access: Ingress and Egress

The final major riparian/littoral right attached to waterfront property is the right to unimpeded access to and from that property to deep water, for the purposes of navigation.

This right to ingress and egress applies to every point along the waterfrontage of a property, including every part of the foreshore in front of that property. It precludes improvements being located in front of a riparian property in such a way as to interfere with that access. A discussion of the types of obstruction considered to constitute such interference is found in Section 4.0 of this report.

The right of access applies to navigable and non-navigable bodies of water. In the case of the former it is subordinate to the public right of navigation. The riparian/littoral right of access is recognized in British Columbia.

2.2.5 Extension of Property Rights

The extent of control or "sphere of influence" of property rights has become an important question in British Columbia, as a direct consequence of historical claims to property rights over the beds of water bodies adjacent to private land. Since the riparian/littoral right extends across the width of the frontage of shoreland property, the question arose as to how far out into a water body those rights extend, by virtue of extension of property rights.

In the case of streams bounded on opposite sides by private land, the "sphere of influence" of such rights was quite naturally considered to extend to a point equidistant from each bank (i.e. the centre or middle of the watercourse). This principle - the principle of ad medium filum aquae (literally "to the middle thread of the stream") - could only be practically applied in the case of narrow streams, and small bays where the distance between shores was relatively short. It was considered impractical to propose that the sphere of influence of such rights be extended to the centre line of anything but a very small lake.

It was confirmed in the case of Kennedy v. Husband - Servas v. Stewart (1907) 9 B.C.R. 205, that the principle of ad medium filum aquae does not apply to large navigable bodies of water. Redel (1975) contends that it has, in fact, never applied to navigable waters in general.

This particular property right has been largely abrogated in British Columbia through an amendment to the Land Act [Section 52(1)] which precludes private right of ownership or control over the beds of streams, lakes, rivers and other water bodies in the Province. There are special circumstances, however, where the principle of ad medium filum aquae may still apply.

2.2.6 Construction of Facilities for Access

Waterfront property has long been recognized as having strategic importance to the conduct of marine commerce. As a consequence, the traditional right of access to deep water for the purpose of navigation (dealt with in Section 4.2.3) has often been interpreted to include the right to construct facilities upon the foreshore to provide for such access.

This assumed right has much greater potential importance than the right to construct protective improvements, because of its extension below the natural boundary of adjacent upland property. It has been taken for granted in the past that the only limitation on the privilege of the upland owner to construct such facilities is that the public right of navigation be maintained.

In British Columbia, title to the foreshore and beds of most lakes and streams, as well as the tidal foreshore, is vested in the Crown. Consequently, the construction of wharves, docks or similar facilities in order to gain access to deep water is not a right of the upland owner in British Columbia - as a direct result of Crown ownership. The construction of such facilities in all cases requires consent of the Province.

2.3 Summary

Of the four fundamental riparian/littoral rights mentioned here and the two other related property rights issues, ad medium filum aquae, the right to water flow of undiminished quality and quantity, and the construction of facilities for the purpose of obtaining access to navigable waters have been either abrogated by statute in British Columbia, or have, in fact, never existed as rights of owners of property abutting waterbodies.

Of the three remaining, the right to protect waterfront property is relatively well established as the limits of that right are defined by the surveyed boundary and upland boundaries of the waterfront property concerned. The right to naturally accreted land is also usually readily determined (based on past legal precedents), although differentiating rapid accretion from gradual and imperceptible accretion can be complicated in that the difference is often only in degree. The right of access has been specifically defined with respect to the upland property, maintaining that ingress and egress must be guaranteed from every point along the property waterfrontage.

The degree to which access to and from deep water can be interfered with by improvements located near shore or offshore is less clearly defined. This issue represents a core problem to the Ministry of Lands, Parks and Housing, in the issuance and administration of tenures in front of privately-owned waterfront properties. This problem is addressed in Section 4.2.3.2.

3.0 RIPARIAN/LITTORAL RIGHTS IN OTHER JURISDICTIONS

Most of the riparian/littoral rights mentioned in the first section of this report are recognized in other jurisdictions.

The three types of riparian/littoral rights still observed in British Columbia, are all recognized and observed in the United Kingdom under the original English common law. The principles governing accretion, access and protection of property in Britain are similar to those adopted here, as are the legal and jurisdictional arrangements for guaranteeing those rights.

In the United States there is some variance in the degree to which the rights of access, accretion and protection of property are recognized. The latter right tends to be much more restricted there than in British Columbia due to the large percentages of privately-owned foreshore in many states. Such private ownership provides the upland owner with greater rights with respect to both protecting his land and constructing facilities for access to navigable waters.

The right to naturally and imperceptibly accreted material is essentially the same in Canada, the U.S. and the U.K., with the same principles being applied (in most cases) to differentiate gradual natural accretion from sudden or artificial accretion.

Regarding the right of access, most if not all American states recognize this right in some form. The State of New Jersey attempted to do away with right of access altogether, but was not successful. The State of New York has adopted much the same attitude as British Columbia, holding that access must not be obstructed, although navigation need not be protected unduly. In the State of Iowa, the riparian right of access was not upheld in legal proceedings, but was subsequently reinstated by statute.

In general, the position adopted by British Columbia with respect to riparian/littoral rights is consistent with that in other jurisdictions - both in terms of the definition of rights, and the legal and institutional arrangements used to ensure their protection. This paper does not address those riparian/littoral rights which are upheld in other jurisdictions but which are no longer observed in British Columbia.

4.0 THE RELATIONSHIP BETWEEN RIPARIAN/LITTORAL RIGHTS AND LAND ACT TENURE ADMINISTRATION

4.1 The Nature and Provisions of Tenure Issued Under the Land Act

The Ministry of Lands, Parks and Housing has the responsibility for authorizing the use and occupation of aquatic Crown lands pursuant to the Land Act. Authorization is given according to established policies of the Ministry using specific types of tenure.

Since 1958, the Province of British Columbia has not sold nor otherwise permanently alienated Crown waterfrontage except in unusual circumstances. Tenures issued over foreshore or adjacent nearshore lands (i.e. waterlots) are also, in most cases, of temporary duration. As such, aquatic Crown land is generally leased, tenured under licence of occupation, or authorized for use by statutory right of way, easement or by Section 10 licence (letter of consent).

4.1.1 Section 10 Licence (Letter of Consent)

A Section 10 licence (letter of consent) may be issued for investigative purposes or for authorization of temporary short-term use, generally with respect to commercial/industrial foreshore operations. Investigative use may be authorized in this manner for periods up to one year, while other temporary uses may be authorized for up to six months.

The Section 10 licence provides temporary short-term authorization to occupy and use Crown land (foreshore, in the context of this report), and generally conveys no right to construct improvements on that land.

4.1.2 Licence of Occupation

A licence of occupation provides authorization to occupy Crown land for a given purpose for a period usually not exceeding ten years. The nature of a licence of occupation is non-exclusive and contractual. It conveys a right to "occupy" Crown land, as opposed to conveying an interest in that land. As such, improvements including structures, buildings, and major modifications to the land are generally not permitted under this form of tenure.

4.1.3 Lease

Lease tenure conveys a limited interest in the land, and also makes allowance for the construction of improvements, usually in accordance with provisions of a management plan for the tenure. The standard term for foreshore leases issued by the Ministry is thirty years.

This type of tenure is used where the land is to be developed or improved for the intended use and/or where a measure of security is required for attaining necessary financial investment or assistance. As is the case with other forms of tenure, a lease may be issued for a particular upland area, foreshore area or waterlot. The latter is usually physically distinct from and not abutting the mean ordinary low water mark.

It is the fact that improvements, modifications and structures can occur on leased lands which makes this form of tenure the most likely to provide an infringement of riparian/littoral rights.

4.1.4 Statutory Right of Way/Easement

Statutory rights of way or easements are used to authorize uses such as public utilities, which are generally of a linear nature. They may be established by the Minister of Lands, Parks and Housing for as long as required.

Such rights of way and easements cross aquatic Crown land in some instances, and the improvements located upon them can result in an infringement of riparian/ littoral rights.

4.1.5 Crown Grant and Fee Simple Disposition

As previously mentioned, except in unusual circumstances the Province does not dispose of Crown foreshore by grant or by fee simple disposition, since the value of maintaining such lands as a public trust is considered of overriding importance. Even long-term foreshore uses are accommodated in almost all cases by lease tenure. Permanent dispositions of Crown land are therefore seldom involved in riparian/littoral rights conflicts.

4.2 Riparian/Littoral Rights and Land Act Tenure Administration in British Columbia

This report assesses the impact of riparian/littoral rights on the administration of Land Act tenures. It also reviews extent to which the Ministry of Lands, Parks and Housing observes the three types of riparian/littoral rights which have not been abrogated by statute in British Columbia.

4.2.1 Protection of Land

The Ministry does not authorize the construction of improvements or the placing of fill for upland protection from erosion or flooding, where such improvements or fill would impinge on the right of access for the adjacent property or on the public right of navigation.

If such construction cannot be confined to an area above the surveyed boundary, the consent of any upland owner whose right of access may be infringed upon is generally sought before alterations to foreshore areas are approved.

Since the right to protect waterfront property is attached to the upland rather than the foreshore, it does not generally conflict with the land administration functions of the Ministry. However, trespass situations arising out of the placement of unauthorized fills and other protective measures on Crown foreshore are not uncommon. In cases where unauthorized fills do occur, it is of particular importance that riparian/littoral rights are not overlooked where a decision is made to legalize such fills.

4.2.2 Accretion

Accretion can occur as a result of many different circumstances, and over different periods of time. As a result, the right of an upland owner to any gradually and imperceptibly accreted material sometimes poses problems for the Ministry. Generally speaking such cases are determined individually, often through legal proceedings based on the provisions of the Land Title Act and the Land Title Inquiry Act.

Where erosion has taken place, it is incumbent upon the Ministry to demonstrate that a change in the upland boundary has occurred. The only type of guideline which could be established to help deal with cases of accretion would be a firmer legal definition clarifying the distinction between gradual and imperceptible natural accretion and sudden and/or artificial accretion.

4.2.3 Access: Ingress and Egress

The one remaining recognized riparian/littoral right - the right of unimpeded access to and from every point along the foreshore adjacent to a waterfront property - does impact significantly on the Ministry's land administration function.

4.2.3.1 Tenure Abutting or Covering the Foreshore

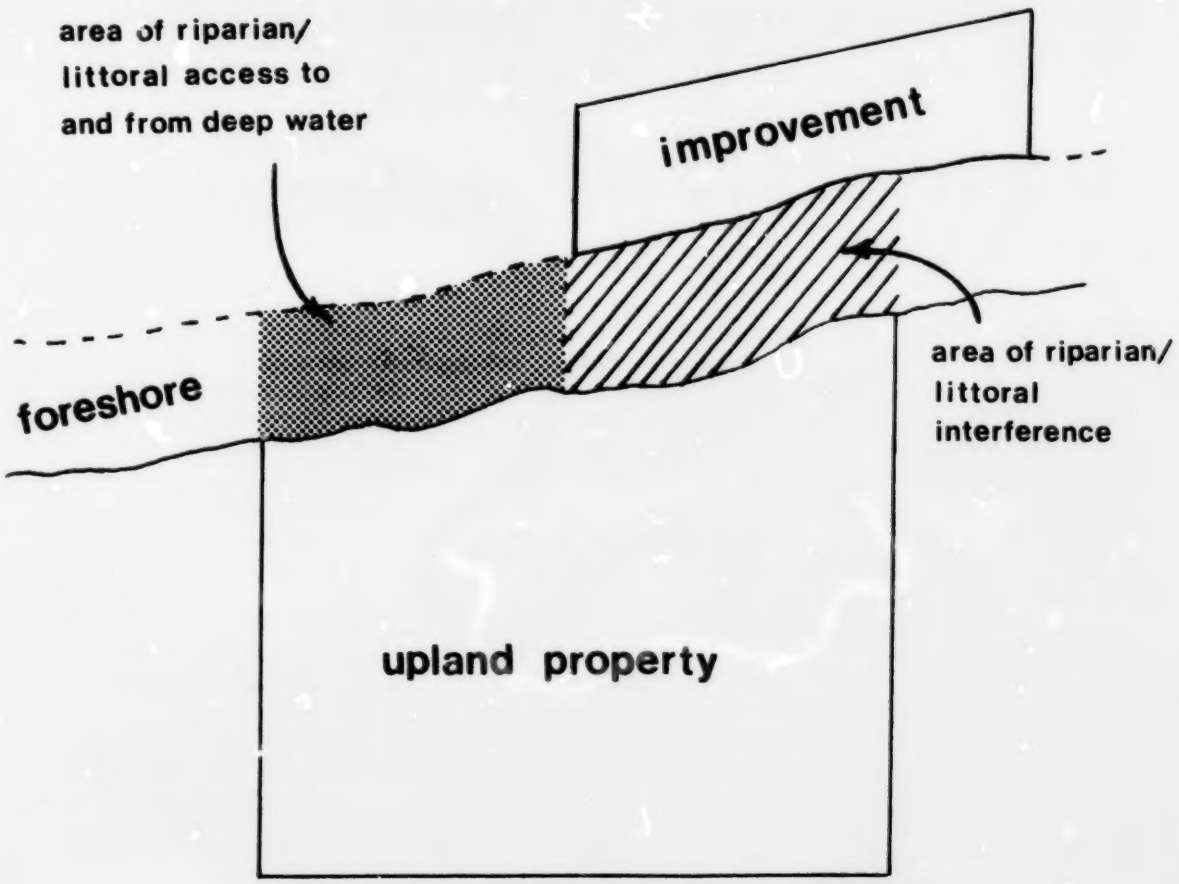
The primary reason that the riparian/littoral right of access can be a problem is illustrated by Figure 1. It shows an upland property and the adjacent foreshore and offshore areas. The property boundaries can be hypothetically extended across the foreshore, to indicate the extent of the foreshore affected by the upland owner's riparian/littoral right of access.

The improvement shown abutting the mean ordinary low water mark in Figure 1 would constitute an obstruction and actionable interference with the upland owner's riparian/littoral right of access. This would be due to the fact that the upland owner would be unable to access deep water for the purposes of navigation from every point along the foreshore in front of his property.

Even though the upland owner would have, in this case, access to deep water from every point along the natural boundary of his property (i.e. the mean ordinary high water mark), the improvement would constitute an infringement of his riparian/littoral right of access.

FIGURE 1:

Tenure With Improvements Located Adjacent to the Foreshore in Front of a Riparian Owner



This fact is consistent with the result of the Attorney General of the Straits Settlement v. Wemyss (1888) 13 A.C. 192 P.C. in which it was ruled that the riparian/littoral right of access is "from every part of the frontage, over every part of the foreshore...."

Interference with riparian/littoral rights would still occur even if the improvement was in the same position relative to the upland property boundaries, but closer to shore (i.e. covering part of the foreshore as well).

The conclusion drawn from this example is that where a foreshore lease or waterlot lease abuts the mean ordinary low water mark or covers part of the foreshore and also extends in front of privately-owned waterfront property, it is likely that the placing of any improvements on the tenure area will constitute an actionable infringement of the owner's right of access.

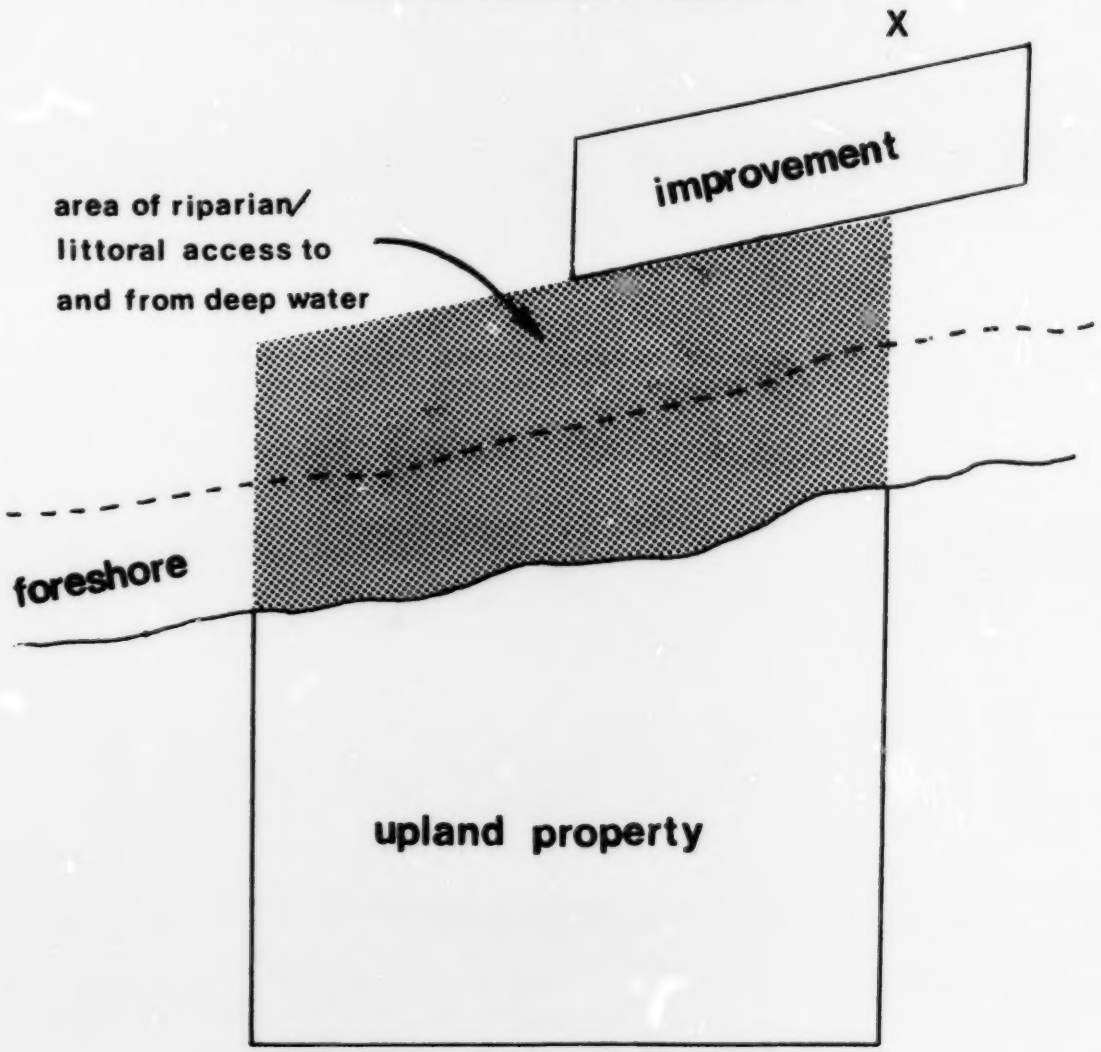
4.2.3.2 Tenure Located Near Shore or Offshore

When a waterlot lease does not abut the mean ordinary low water mark or cover part of the foreshore but still extends in front of privately-owned waterfront property, the situation is less easily clarified. Traditionally, the Ministry has avoided locating waterlot leases in front of private waterfront property to ensure that there is no infringement of upland owner's rights.

Figure 2 illustrates an "offshore" waterlot lease extending in front of a privately-owned waterfront property. The improvement as positioned will interfere with the upland owner travelling to the point marked "X" on the diagram. However, the improvement does not prevent the upland owner from accessing deep water from every point along the foreshore in front of his property - as indicated by the shaded area on the diagram.

FIGURE 2:

Tenure With Improvements Located Nearshore
in Front of a Riparian Owner



The improvement may constitute in this example an interference with the owner's right of navigation. However, because access to deep water is provided from every point along the foreshore, an infringement of the riparian/littoral right of access should not occur.

The legal precedents from which this conclusion can be drawn were provided by the outcome of the case of Redwood Park Motel Limited v. British Columbia Forest Products Limited (1953) 8 W.W.R. 242 which states:

> "The Crown has no power to licence the lessee to obstruct navigation or to interfere with a riparian proprietor's right of access."

Further, it was stated in this case that:

> "The right of navigation in tidal water is a right of way thereover for all the public for all purposes of navigation, trade and intercourse. It is a right given by the common law, and is paramount to any right that the Crown or a subject may have in tidal waters, except when such rights are created or allowed by an Act of Parliament. Consequently, every grant by the Crown in relation to tidal waters must be construed as being subject to the public rights of navigation. It is not a right of property; it is merely the right to pass and repass and to remain for a reasonable period of time."

It appears from the example detailed in Figure 2 that the Crown would not be in a position to locate the lease for a log boom or similar improvement where it would constitute a hindrance to the public right of navigation. At present, the Ministry abides by the provisions of the federal Navigable Waters Protection Act in locating foreshore and waterlot leases and licences.

The upland owner's right of navigation appears to be equivalent to the general public's right of navigation. Therefore, a problem should only occur where the upland owner can prove special damage as a result of the location of a waterlot lease (provided that the lease does not constitute an infringement to the right of public navigation under the Navigable Waters Protection Act).

4.2.4 Summary

The riparian/littoral rights pertaining to protection of land from erosion and flooding and to ownership of naturally accreted land do not impact severely on the Ministry's land administration function. However, it is clear that the question of riparian/littoral access can and does have a direct bearing on that function, which can be summarized as follows:

1. The riparian/littoral right of access requires that the upland owner be able to get to and from deep water in a navigable craft of reasonable size from every point along his waterfront property, and from every point along the foreshore directly in front of that property;

2. Any obstruction which makes it impossible for every point along the adjacent foreshore to be accessed from deep water is likely to be actionable as an infringement of the upland owner's riparian/littoral rights; and

3. Any obstruction which is located in front of privately-owned waterfront property and which does not constitute an infringement of the riparian/littoral right of access may constitute an actionable impedance to the owner's public right of navigation. However, unless the owner can prove special damage, this right requires only the same consideration as the general public's right of navigation.

5.0 ADMINISTRATIVE GUIDELINES

It is clear as a result of the analysis presented in this paper that certain riparian/littoral rights are still recognized in the Province of British Columbia. Of these, it is the right of unimpeded access to and from waterfront property and the adjacent foreshore that poses the greatest concern from a land administration standpoint.

5.1 Foreshore Tenure Involving Improvements

In the past, the Ministry has adopted a policy of not locating foreshore leases (on which improvements may be added) in front of privately-owned upland areas, unless the written consent of the upland owner has been obtained. Such consent does not abrogate the riparian/littoral rights which run with the property in question, so the Ministry endeavours to ensure that the term of any tenure issued with such consent does not exceed the term remaining on the adjacent non-fee simple upland tenure. In the case of leases which cover all or part of the foreshore in front of privately-owned waterfrontage this policy must still apply. There is no apparent way of avoiding the fact that improvements on such lease tenures would infringe upon the riparian/littoral right of access.

Where authorized fill is placed over the foreshore, that area is generally disposed in fee simple as an extension of the adjacent upland. Consent of the upland owner is a prerequisite to such fill being authorized by the Ministry.

5.2 Nearshore and Offshore Tenure Involving Improvements

In the case of waterlot leases, it would appear that the requirement which must be met in all cases is that the lease be located far enough offshore from the mean ordinary low water mark for a boat of reasonable size (in some legal judgements a vessel of approximately 40 ft. in length was suggested as a standard) to access every point along the foreshore adjacent to the private property to and from deep water.

If access is guaranteed in this manner, and the waterlot lease does not constitute an impedance to the public right of navigation, and further if the upland owner is in no position to claim special damages with respect to infringement of his (public) right of navigation, then his consent should not be required.

5.3 Tenure Not Involving Improvements

For licences of occupation and Section 10 licences, either located over the foreshore or restricted to nearshore or offshore waterlots, the upland owner's consent should not be required (as long as no improvements which would impede access are involved). If, however the licence of occupation involves improvements - even if they are only temporary such as trays or rafts for oyster culture - the same requirements would apply as apply to leases as detailed above.

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